delivery upon the one side, as opposed to the more liberal view that the clear intention of the parties should not be defeated by technical considerations. For additional discussion see 12 RULING CASE LAW 946, 22 HARV. L. REV. 453, and 15 HARV. L. REV. 751.

HIGHWAYS—COASTING TRAVELER.—In an action for damages for personal injuries resulting from a collision on a public road between defendant's carriage and a sled upon which plaintiff was coasting for pleasure, it was *held* that each party had equal rights as travelers, and that coasting was not such an act as to amount to a public nuisance, and consequently no bar to recovery. *Roennau* v. *Whitson,* (Ia., 1920), 175 N. W. 849.

In some jurisdictions coasting on city streets is deemed a public nuisance *per se* (*Wilmington* v. *Vandegrift,* 1 Marv. 5; *Reusch* v. *Licking Rolling Mill Co.,* 118 Ky. 369); while a statement to the contrary is found in *Jackson* v. *Castle,* 80 Me. 119. But even by such courts as the latter it is asserted, *obiter,* that under some circumstances coasting coupled with boisterous conduct may constitute a nuisance. Even the principal case does not go so far as to deny that proposition. Many of the cases on this subject are suits against municipalities by persons injured by coasters, where the municipality had, by ordinance, forbidden coasting (*Faulkner* v. *City of Aurora,* 85 Ind. 130), or where it had expressly given permission for such use (*Burford* v. *Grand Rapids,* 53 Mich. 98), in both cases a recovery being denied. Consciously or unconsciously, the courts are influenced by two considerations, viz., the means of locomotion and the purpose of the use, in this problem of determining who is a traveler. For instance, in *McCarthy* v. *Portland,* 67 Me. 167, the court says by way of *dictum* that a boy might be a traveler if he coasts on his way to school, but not if he does so for pastime, but it is submitted that the fact was there lost sight of that highways are properly intended and used for purposes of pleasure as well as of business. Where the injured party's play involved travel over the highway, a recovery was allowed in *Reed* v. *Madison,* 83 Wis. 371, and in *Beaudin* v. *Bay City,* 136 Mich. 333; and in *Gulline* v. *Lowell,* 144 Mass. 491, we find the same result even though the injured party was, at the moment of injury, engaged in a sport not connected with travel. Compare with this last case *Blodgett* v. *Boston,* 8 Allen (Mass.) 237, and *Tighe* v. *Lowell,* 119 Mass. 472. On all fours with the case at hand is *Lynch* v. *Public Service Ry. Co.,* 82 N. J. L. 712, 42 L. R. A. (N.S.) 865, note. See also the note in 4 Ann. Cas. 248.

MASTER AND SERVANT—LIABILITY OF OWNER FOR INJURIES TO AN INVITEE OF HIS CHAUFFEUR.—Defendant sent his chauffeur on an errand with his car. Contrary to instructions the chauffeur invited plaintiff's intestate to ride with him. The car was overturned and both were killed. In an action to recover for death of intestate, *held,* defendant was not liable, as chauffeur acted outside of his authority in inviting deceased to ride. *Rolfe* v. *Hewitt* (N. Y., 1920), 125 N. E. 804.

Some difficulty was experienced in reaching the decision in this case. The plaintiff recovered in the trial court, and a divided court affirmed the

decision in the Appellate Division, apparently approving the theory of the trial court that the deceased was a licensee of the defendant, being in the car with the chauffeur's permission, and defendant, through his servant, owed him a duty of ordinary care. Had the view of the trial judge prevailed a very stringent liability indeed would be fixed on automobile owners who employ chauffeurs. On the general subject of a master's liability for the torts of his servant, Justice Holmes has said, "It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment." *Dempsey* v. *Chambers,* 154 Mass. 330. In some cases this liability is extremely severe, as in the case of the carrier, who is liable for assault and battery by a servant on a passenger even though committed under circumstances wholly unconnected with the discharge of servant's duty. HUTCHINSON, CARRIERS, [3d Ed.] § 1093, and cases there cited. This liability extends not only to conductors but also to brakemen and porters of sleeping and drawing-room cars. HUTCHINSON, *supra,* §§ 1094, 1095. The basis of the liability in these cases can be put on broad considerations of public policy, but in the present case no such considerations seem to enter. In automobile cases, in order to render the owner liable for the negligence of the driver, the latter must be his servant or agent and acting within the scope of his employment at the time the act was committed. This rule has been invoked mainly where a pedestrian has been injured by negligent driving. That case is to be distinguished from the principal case in that there the person is rightfully in the street when injured, while an invitee of the chauffeur is not rightfully in the owner's car. In the former case, where the driver is acting for the master at the time of the accident, the employer is liable for the driver's negligence; as to one rightfully in the road, driver is servant of the owner. Ann. Cases, 1914-C 1087, and numerous cases there cited. Where the chauffeur is on some errand of his own or is acting contrary to orders at time of accident, the owner is not liable; driver is not servant of owner,—he is acting for himself. *Colwell* v. *Aetna Bottle and Stopper Co.,* 33 R. I. 531. The situation in the principal case is distinguishable from this. The driver was on an errand for his employer. As to a pedestrian, the driver was, therefore, the owner's servant and owner would be liable for injuries to such pedestrian. But as to an invitee of the driver, the master-servant relation did not exist. In driving the car, the chauffeur was acting within the scope of his employment. In inviting another to ride with him he was acting outside it. As to the invitee the driver was not the servant of the owner, though he would be as to pedestrians or others lawfully in the highway. See an interesting case, *Powers* v. *Williamson,* 189 Ala. 600, where defendant permitted his son to use his car to take three of son's friends for a ride on condition that he secure one Skeggs to drive the car. The arrangement was made, and Skeggs invited the plaintiff to join the party. Plaintiff was injured through negligent driving of Skeggs and sued the owner of the car. The court denied his liability and stated that if "* * * Skeggs was, as to third parties, and as to the son and the three young ladies who were his guests—a matter which is not before us—the servant of the father, he was not the

servant of the father insofar as Miss Powers (the plaintiff) was concerned." There have been only a few cases involving a suit by an invitee of the chauffeur, injured through his negligence, though in the realm of horse-drawn vehicles the law is well-settled that the owner is not liable. *Driscoll* v. *Scanlon,* 165 Mass. 348; *Scott* v. *Peabody Coal Co.,* 153 Ill. App. 103; *Schulwitz* v. *Delta Lumber Co.,* 126 Mich. 559. See also, decided on the same day as principal case, *Goldberg* v. *Borden's Condensed Milk Co.,* (N. Y., 1920) 125 N. E. 807. A similar rule has been employed where employees of a common carrier invite a person to ride without paying fare. Such a person is not entitled to the rights of a passenger. See extended note 37 L. R. A. (N.S.) 419 and cases there cited. These rules denying master's liability have been applied in automobile cases with few exceptions, one of which is noted below. The texts on automobile law lay down the broad rule that a guest of a driver cannot recover against the owner. THE LAW APPLIED TO MOTOR VEHICLES, BABBITT, [2d Ed.] § 818; HUDDY ON AUTOMOBILES, [4th Ed.] § 276. Similar statement in Ann. Cases 1917-D 1001. The decision in the principal case is in accord with this view and is supported by the following decisions in other states: *Walker* v. *Fuller,* 223 Mass. 566; *Gruber* v. *Cater Transfer Co.,* 96 Wash. 544; *McQueen* v. *People's Store Co.,* 97 Wash. 387; *Waller* v. *Southern Ice and Coal Co.,* 144 Ga. 695, holding uniformly that an invitation by a chauffeur to ride with him is an act outside the scope of his authority. A similar view is expressed in *Eberle Brewing Co.* v. *Briscoe Motor Co.,* (Mich.) 160 N. W. 440, though the suit was not by an invitee who had been injured. A contrary rule was laid down in the jurisdiction of the principal case in *Royal Indemnity Co.* v. *Platt and Washburn Ref. Co.,* 163 N. Y. Supp. 197, where an employee whose business was soliciting orders, using his employer's car for this purpose, invited another to ride with him. The passenger was injured and was held to be a licensee of the employer. There was evidence that the employee was soliciting an order from the invitee during the trip, but that was not the basis of the decision. The court cited *Grimshaw* v. *L. S. and M. S. R. Co.,* 205 N. Y. 366 and *Adams* v. *Tozer,* 149 N. Y. Supp. 163, as sustaining its position. The *Grimshaw case* does not involve the point in question and is distinguished by the court in the principal case. Plaintiff's intestate, in that case, was in the habit of riding to and from work on a Wabash engine which was struck by an engine of defendant's road. Defendant was held liable. The status of the injured person with reference to the Wabash road was immaterial to the question tried although the court discussed whether he was licensee or trespasser as to them. In *Adams* v. *Tozer, supra,* which is not discussed in the principal case, and which can be distinguished on its facts, defendant was hired to move household goods from a car to plaintiff's house. Plaintiff assisted driver, as was evidently contemplated by the parties, and the driver invited him to ride in the moving van, which overturned injuring plaintiff. Plaintiff was held to be a licensee of the owner and was allowed to recover on the ground that the driver had implied authority to do what was reasonable and necessary to move the goods, and inviting the plaintiff to ride was not outside that authority. From this it is apparent that the cases cited in it do not support

the conclusion in the *Royal Indemnity case,* and it is believed that that decision was overruled by the principal case, settling the law in New York in accord with the authorities elsewhere.

MUNICIPAL CORPORATIONS—CITY MANAGER AN OFFICER AND NOT AN EMPLOYEE.—The city of Hot Springs, Arkansas, adopted the provisions of Act No. 114 of the Acts of 1917, which brought them under the commission form of city government, and the plaintiff was appointed city manager in accordance with the act. This act in Sec. 33 provides, among other things, that the city manager need not be a resident of the city at the time of his appointment. In this action,—which is to determine which one of two appointed boards of health is the legal one,—it is contended that the whole of Act No. 114 is unconstitutional since the state constitution in Art. 19, Sec. 3 provides that no person shall be elected or appointed to fill an *office* who does not possess the qualifications of an elector. One of the qualifications of an elector is that he shall be a resident. *Held,* that a city manager is an officer and comes under the constitutional provision as to qualifications of an officer, but that the non-residence feature of the act can be stricken out since the legislature would have passed the act without it. *McClendon* v. *Board of Health,* (Ark., 1919) 216 S. W. 289.

This case involves the much mooted question as to whether a certain position is a public office or merely an employment. Employment is the broader term and includes a public office, but all employments are not public offices. *Rickers Petition,* 66 N. H. 207, 232; *U. S.* v. *Maurice,* 2 Brock. (U. S.) 96. It has sometimes been laid down as a general rule, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power, and in the performance of which, the public is concerned and which also are continuing in their nature and not occasional or intermittent. *Groves* v. *Barden,* 169 N. C. 8; *U. S.* v. *Heinze,* 177 Fed. 770; (cannot be occasional service); *Scully* v. *U. S.,* 193 Fed. 185 (must be created by law); *Ill. Industrial Home for the Blind* v. *Dreyer,* 150 Ill. App. 574; (position created by law); *Blynn* v. *The City of Pontiac,* 185 Mich. 35 (performance of duties a matter of public concern); *State Tax Commission* v. *Harrington,* 126 Md. 157 (an office involves a delegation to the individual of some of the sovereign functions of government to be exercised by him for the benefit of the public). However the courts have ordinarily, in the different cases considered by them, passed upon the facts of each case and then reached a conclusion that the necessary elements were or were not present. *State Tax Commission* v. *Harrington, supra; Fredericks* v. *Board of Health,* 82 N. J. L. 200. In the principal case the court relied upon *Throop* v. *Langdon,* 40 Mich. 673, 682, where Judge Cooley said, "the office is distinguished from the employment in the greater importance, dignity, and independence of the position; in being required to take an official oath, and perhaps to give an official bond, etc." This view is to a great extent like the earlier authorities, *United States* v. *Hartwell,* 6 Wall. 385; *Hall* v. *Wisconsin,* 103 U. S. 5, although some of the recent cases have considered the absence or presence of a bond along with